Quisenberry Mills, Inc., Debtor in Possession *and* Lester Ashmore *and* American Federation of Grain Millers, AFL–CIO, Local Union No. 16. Cases 17–CA–15125 and 17–CA–15181

December 6, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

Upon a charge filed by Lester Ashmore, an individual, in Case 17–CA–15125 on July 24, 1990, and amended on October 23, 1990, and upon a charge filed by the Union in Case 17–CA–15181 on August 27, 1990, and amended on October 11, 1990, the General Counsel of the National Labor Relations Board issued a consolidated complaint on October 23, 1990, against Quisenberry Mills, Inc., Debtor in Possession, the Respondent, alleging that it violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. On December 6, 1990, the Respondent filed an answer that did not conform with the Board's Rules and Regulations. On December 13, 1990, the Respondent filed an amended answer.

On March 4, 1991, the Regional Director for Region 17 of the Board approved an informal settlement agreement disposing of the charges. On June 13, 1991, however, the Acting Regional Director for Region 17 issued an order vacating the settlement agreement due to the Respondent's failure to comply with its terms. Accordingly, the General Counsel issued another consolidated complaint against the Respondent on June 14, 1991, alleging that it has violated Section 8(a)(1), (3), and (5) of the Act.[1] Although properly served with a copy of the consolidated complaint, the Respondent has failed to file an answer.

On September 30, 1991, the General Counsel filed a Motion for Summary Judgment, with exhibits attached. On October 7, 1991, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent did not file a response. The allegations in the motion therefore are undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on the Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The June 14, 1991 complaint states that unless an answer is filed within 14 days of issuance, "all of the allegations in the Consolidated Complaint shall be deemed to be admitted to be true and shall be so found by the Board." Further, the undisputed allegations in the Motion for Summary Judgment disclose that by letters dated July 17, 1991, and August 13, 1991, counsel for the General Counsel advised the Respondent that no answer had been received, and that unless an answer was received by July 24, 1991, and August 21, 1991, respectively, counsel for the General Counsel would move for summary judgment.[2] On August 21, 1991, counsel for the General Counsel advised the Respondent's attorney by telephone that no answer had been filed, and the Respondent's attorney advised counsel for the General Counsel that he would likely advise his client not to file an answer to the consolidated complaint. Counsel for the General Counsel extended the deadline for submission of an answer to August 26, 1991.

In the Motion for Summary Judgment, the General Counsel alleges that the Respondent has failed to file an answer to the June 14, 1991 consolidated complaint. The General Counsel further alleges that the Respondent's answers filed on December 6 and 13, 1990, were withdrawn on approval of the informal settlement agreement and are not extant.

It is undisputed that the Respondent did not file an answer to the June 14, 1991 consolidated complaint.The record shows that the Respondent filed answers to the October 23, 1990 consolidated complaint on December 6 and 13, 1990. The record further shows that the parties entered into an informal settlement agreement which provided, in pertinent part: "Approval of this Agreement by the Regional Director shall constitute withdrawal of any Complaint(s) and Notice of Hearing heretofore issued in this case, *as well as any answer(s) filed in response*." (Emphasis added.) On March 4, 1991, the Respondent signed the settlement agreement, which was approved by the Regional Director on March 4, 1991. We find that the Respondent's December 6, 1990 answer and December 13, 1990 amended answer were withdrawn by the explicit terms of the settlement agreement. We further find that the June 13, 1991 order vacating the settlement agreement did not revive the original consoli-

[1] This consolidated complaint makes the same substantive allegations as the original consolidated complaint.

[2] The August 13, 1991 letter also stated that on July 17, 1991, a letter was mailed to both the Respondent and his attorney requesting that an answer be filed by the close of business on July 24, 1991, but that the letter to the Respondent came back to the Regional Office as "undeliverable."

dated complaint nor the answers filed in response thereto. Accordingly, we conclude that the December 6, 1990 answer and December 13, 1990 amended answer do not remain extant,[3] and therefore do not preclude granting the General Counsel's Motion for Summary Judgment.

In the absence of good cause being shown for the failure to file an answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Kansas City, Missouri, has been engaged in the operation of a grain mill.[4] During the 12 months preceding issuance of the June 14, 1991 consolidated complaint, the Respondent, in the course and conduct of its business operations, sold and shipped from its Kansas City, Missouri facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of Missouri. We find that the Respondent is an employer engaged in commerce with the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees, including truck drivers employed by Respondent at its Kansas City, Missouri facility; but EXCLUDING office clerical employees, guards and supervisors as defined in the Act.

From about 1970 until about January or February 1989, the Union had been the designated exclusive collective-bargaining representative of the unit employed by Quisenberry I, and during that time, the Union had been recognized as the representative by Quisenberry I. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective by its terms for the period December 1, 1988, through November 30, 1990. Around January or February 1989, the Respondent adopted the collective-bargaining agreement described above. Since about January or February 1989, and continuing to the present date, the Union has been the designated exclusive collective-bargaining representative of the Respondent's employees in the unit.

From about 1970 to about January or February 1989, the Union, by virtue of Section 9(a) of the Act, had been the exclusive representative of the unit employed by Quisenberry I for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. At all times since about January or February 1989, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the Respondent's employees with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Since about the following dates, and continuing to date, the Respondent has failed to continue in full force and effect all the terms and conditions of the collective-bargaining agreement by: (1) since about January 24, 1990, failing and refusing to pay contractual pension contributions for the unit; (2) since about February 1990, failing and refusing to pay contractual wage rates to the unit; (3) since about March 7, 1990, terminating the contractual health insurance carrier and coverage for the unit and implementing a different health insurance carrier and coverage for the unit; and (4) since about July 7, 1990, failing and refusing to pay contractual overtime wages rates to the unit.

The terms and conditions of the agreement the Respondent failed to continue in full force and effect are terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining. The Respondent engaged in the acts and conduct described above without prior notice to the Union, without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of the unit with respect to such acts and conduct, and without agreement of the Union as the exclusive representative of the unit with respect to such acts and conduct.

Since about August 1, 1990, and continuing to date, the Respondent removed an employee and a bargaining unit position from the unit. The subjects set forth above relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining. The Respondent engaged in the

[3] See *Ofalco Properties*, 281 NLRB 84 (1986), and *Orange Data, Inc.*, 274 NLRB 1018 (1985).

[4] About January or February 1989, the Respondent purchased the business of Quisenberry Mills, Inc. (Quisenberry I), and since that date has continued to operate the business of Quisenberry I in basically unchanged form, and has as a majority of its employees individuals who were previously employees of Quisenberry I. About June 21, 1989, the Respondent filed for relief under Chapter 11 of the United States Bankruptcy Code. Since about June 21, 1989, the Respondent has been a debtor in possession with full authority to continue its operations and to exercise all powers necessary to administer its business.

acts and conduct described above without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of the Respondent's employees with respect to such acts and conduct. By all of the acts and conduct described above, the Respondent has failed and refused, and is failing and refusing, to bargain collectively with the representative of its employees, and the Respondent thereby has been engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

Since about January 24, 1990, and continuing to date, the Respondent has deducted union dues from the wages of its employees Robert Stoll, James Minnish, Dave May, Jim Mosely, Brian Shane, Lester Ashmore, and Tom Romi without having valid dues-checkoff authorizations from these employees. By engaging in the conduct described above, the Respondent has encouraged its employees to join, support, or assist the Union. By the acts and conduct described above, the Respondent has discriminated, and is discriminating, in regard to the hire or tenure or terms or conditions of employment of its employees, thereby encouraging membership in a labor organization, and the Respondent thereby has been engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

The Respondent, acting through owner Tim Belvin at the Respondent's facility: (1) about February 1990 told its employees that the Respondent wanted the Union out of the facility and that new employees would not be allowed to join the Union; (2) about May 30, 1990, threatened its employees with unspecified reprisals for attempting to utilize the contractual grievance procedure; and (3) about June 1, 1990, told its employees that attempting to utilize the Union to obtain contractual wage rates would be futile. Around late June 1990, the Respondent acting through owner Todd Belvin at the Respondent's facility: (1) threatened its employees with discharge if they continued to attempt to process a grievance; (2) told its employees that it would be futile for them to continue processing a grievance; and (3) interrogated its employees concerning their continuing to process a grievance. By the acts and conduct described above, the Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed in Section 7 of the Act, and the Respondent thereby has been engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. By failing to continue in full force and effect all the terms and conditions of employment of the collective-bargaining agreement by failing and refusing since about January 24, 1990, to pay contractual pension contributions for the unit; by failing and refusing since about February 1990, to pay contractual wage rates to the unit; since about March 7, 1990, by terminating the contractual health insurance carrier and coverage and implementing a different health insurance carrier and coverage for the unit; since about July 7, 1990, by failing and refusing to pay contractual overtime wage rates to the unit; and by removing, since about August 1, 1990, an employee and a bargaining unit position from the unit; the Respondent has failed and refused, and is failing and refusing, to bargain collectively with the exclusive representative of its employees, and the Respondent thereby has been engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Secton 2(6) and (7) of the Act.

2. By deducting, since about January 24, 1990, union dues from the wages of its employees without having valid dues-checkoff authorizations from these employees, the Respondent has discriminated, and is discriminating, in regard to the hire or tenure or terms or conditions of employment of its employees, thereby encouraging membership in a labor organization, and the Respondent thereby has been engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

3. By telling employees, about February 1990, that the Respondent wanted the Union out of the facility and that new employees would not be allowed to join the Union; by threatening employees, about May 30, 1990, with unspecified reprisals for attempting to utilize the contractual grievance procedure; by telling its employees that it would be futile for them to continue processing a grievance, and by interrogating employees concerning their continuing to process a grievance, the Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed in Section 7 of the Act, and the Respondent thereby has been engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative

action designed to effectuate the policies of the Act.

Having found that the Respondent failed to pay contractual wage rates, changed health insurance carrier and coverage, failed to pay overtime as required by the contract, deducted union dues from unit employees' paychecks without dues-checkoff authorizations from the employees, and unilaterally removed an employee from the bargaining unit, we shall order the Respondent to make whole the unit employees for any losses of earnings and other benefits they may have suffered as a result of the Respondent's conduct, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682, 683 (1970), and reimburse employees for any expenses ensuing from the Respondent's failure to make required payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). All payments to employees shall be made with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We also shall order the Respondent to restore the health insurance coverage which it unilaterally changed and the bargaining unit position it removed. Having found that the Respondent failed to pay contractual pension contributions, we also shall order the Respondent to make whole unit employees by making pension contributions as provided in the collective-bargaining agreement with the Union, which have not been paid.[5]

ORDER

The National Labor Relations Board orders that the Respondent, Quisenberry Mills, Inc., Debtor in Possession, Kansas City, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with American Federation of Grain Millers, AFL–CIO, Local Union No. 16, as the exclusive representative of the unit described below by failing and refusing to pay contractual pension contributions and contractual wage rates; by terminating the contractual health insurance carrier and coverage and implementing a different health insurance carrier and coverage; by failing and refusing to pay contractual overtime wage rates; and by removing an employee and a bargaining unit position from the unit without affording the Union an opportunity to bargain.

The unit is:All production and maintenance employees, including truck drivers employed by Respondent at its Kansas City, Missouri facility; but EXCLUDING office clerical employees, guards and supervisors as defined in the Act.

(b) Deducting union dues from the wages of its employees without having valid dues-checkoff authorizations from the employees.

(c) Telling employees that the Respondent wanted the Union out of the facility and that new employees would not be allowed to join the Union; threatening employees with unspecified reprisals for attempting to utilize the contractual grievance procedure; telling employees that attempting to utilize the Union to obtain contractual wage rates would be futile; threatening its employees with discharge if they continued to attempt to process a grievance; telling its employees that it would be futile for them to continue processing a grievance; and interrogating its employees concerning their continuing to process a grievance.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the unit employees for any losses of earnings and other benefits they may have suffered as a result of the Respondent's failure to pay contractual wage rates, its changes in health insurance carrier and coverage, its failure to pay overtime as required by the contract, its failure to make pension contributions, and its unilateral removal of an employee from the bargaining unit, in the manner set forth in the "Remedy" section of this decision.

(b) Make whole the unit employees for any losses of earnings they may have suffered as a result of the Respondent's deduction of union dues from unit employees' paychecks without dues-checkoff authorizations from the employees.

(c) Restore the health insurance coverage it unilaterally changed and the position it unilaterally removed from the bargaining unit.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

[5] Because the provisions of employee benefit fund agreements are variable and complex, we leave to the compliance stage the question of whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make whole" remedy. *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

(e) Post at its facility in Kansas City, Missouri, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with American Federation of Grain Millers, AFL–CIO, Local Union No. 16, as the exclusive representative of the employees in the appropriate unit set forth below, by failing to pay contractual pension contributions, by failing to pay contractual wage rates; by terminating the contractual health insurance carrier and coverage and implementing a different health insurance carrier and coverage; by refusing to pay contractual overtime wage rates; and by unilaterally removing an employee and a bargaining unit position from the unit without affording the Union an opportunity to bargain. The unit is:

All production and maintenance employees, including truck drivers employed by Respondent at its Kansas City, Missouri facility; but EXCLUDING office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT deduct union dues from the wages of our employees without having valid dues-checkoff authorizations from the employees.

WE WILL NOT tell our employees that we want the Union out of the facility and that new employees would not be allowed to join the Union; threaten our employees with unspecified reprisals for attempting to use the contractual grievance procedure; tell our employees that attempting to utilize the Union to obtain contractual wage rates would be futile; threaten our employees with discharge if they continue to attempt to process a grievance; tell our employees that it would be futile to continue processing a grievance; and interrogate our employees concerning their continuing to process a grievance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole our unit employees by making pension fund contributions as required by our collective-bargaining agreement with the Union.

WE WILL make whole our unit employees for any losses of earnings and other benefits, with interest, as a result of our failure to pay contractual wage rates, changes in health insurance carrier and coverage, failure to pay overtime as required by the contract, deduction of union dues from unit employees' paychecks without checkoff authorizations, and removal of an employee and a unit position from the unit.

WE WILL restore the health insurance coverage we unilaterally changed and the position we unilaterally removed from the bargaining unit.

QUISENBERRY MILLS, INC. DEBTOR
IN POSSESSION